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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 405

JOHN L. LODWICK, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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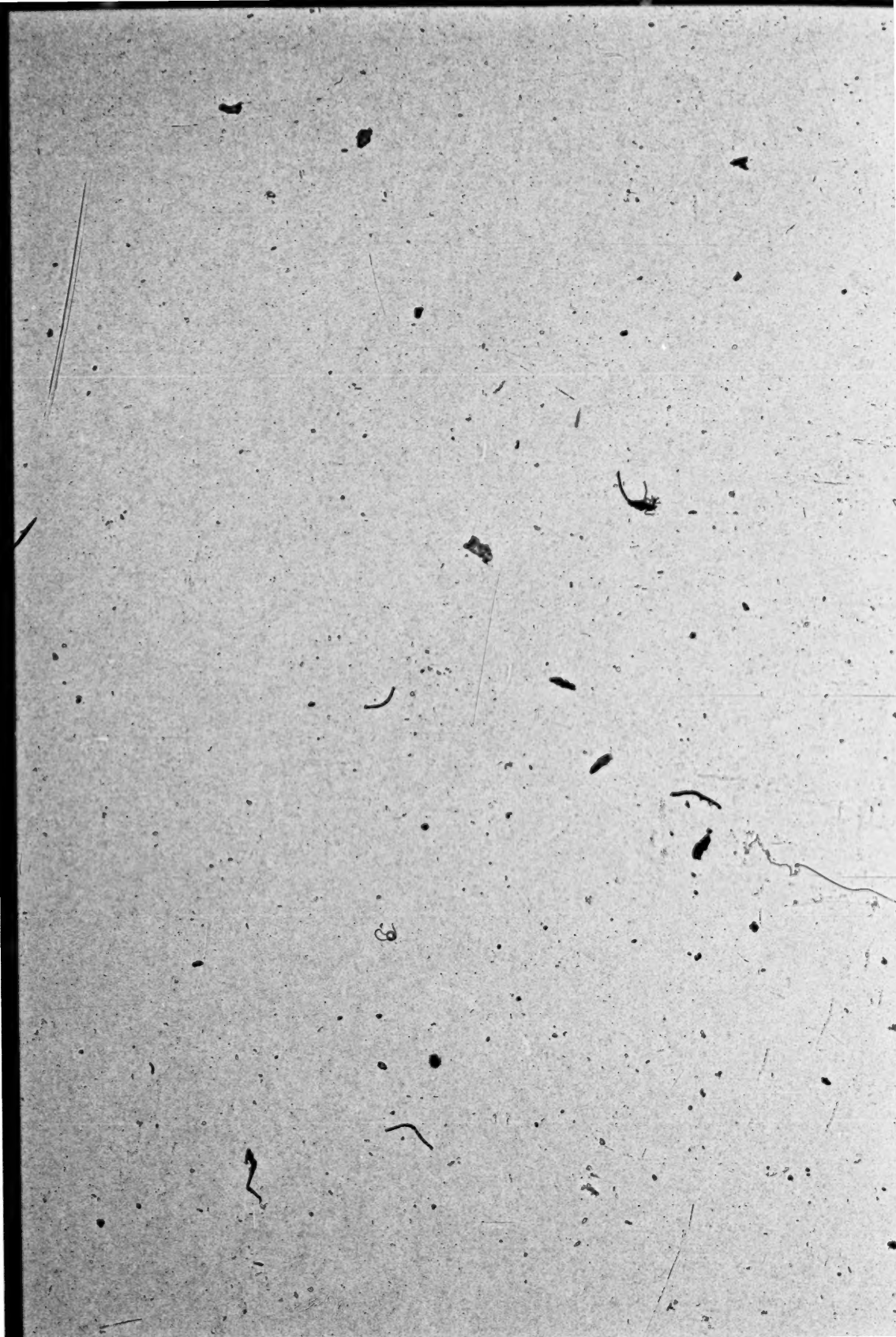

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The Government makes an ostrich type approach to the issues herein by figuratively hiding its head in the sand in the belief they will go away. The Government assumes the position of being entirely satisfied and complacent with the various conflicting applications of the case of *Holland* v. *United States*, 348 U. S. 121, 139-140, by the different Circuits, with the Fifth, Ninth and Third

Circuits holding contrary to the decision of the Eighth Circuit herein and confusion in the Eighth Circuit with five decisions of that Court in accord with the present decision and eight decisions contrary thereto and in accord with the Fifth, Ninth and Third Circuits (Pet. pp. 28, 29).

In the light of the announced program of the Government to move rapidly forward with progressive procedural reforms to expedite the administration of justice we had reason to expect help from the Government in clearing up this conflict and confusion which call for so much time and effort of the various United States Courts of Appeal and Counsel for the Government as well as counsel for the private litigants, all of which can be resolved by the judgment of this court.

In the case of *Riggs* v. *United States*, 5 Cir., 280 F. 2d 949, the Court pointed out the conflict between the Circuits on the "Second Circuit Doctrine," adopted by the opinion herein, and the Opposing doctrine which we here urge, saying (280 F. 2d, l. c. 954):

> "As said, again by Judge Learned Hand, in United States v. Andolschek, 2 Cir., 1944, 142 F. 2d 503, 505: 'The accused at bar do not argue that the evidence was not strong enough to support a verdict in a civil case, and it certainly was; that being true, our review ends.' The question was further discussed at length by that Circuit in still later opinions, in United States v. Costello, 2 Cir., 1955, 221 F. 2d 668, 671, in United States v. Gonzales Castro, 2 Cir., 1956, 228 F. 2d 807, and in United States v. Masiello, 2 Cir., 1956, 235 F. 2d 279. In powerful dissents in the last two cases, Judge Frank termed this ruling the 'Second Circuit doctrine' (235 F. 2d 288) to distinguish it from cases which he cited to show that a contrary doctrine prevailed in the Third, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits. See footnote 4, 228 F. 2d 809, and footnote 12, 235 F. 2d 291. See also footnote 3, 221 F. 2d 680."

The Government does not undertake to deny this conflict and confusion but seeks to disengage itself from the controversy by treating it as inconsequential and trying to brush it aside.

> On page 5 of its brief the Government states: "In various circumstantial evidence cases, this Court has repeatedly confirmed that a motion for acquittal at the close of a case raises a question of law 'which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict.'" * * * "That is precisely the approach taken by the courts below here, and further review is thus not warranted."

That statement merely begs the question instead of answering it. We challenge that statement. That is not "precisely the approach taken by the Courts below" as demonstrated by the fifteen United States Circuit Court of Appeals cases cited on pages 28 and 29 of this Petition holding, "the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt."

The test as to whether a submissible case is made is not merely "whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict" (page 5, Government Brief) but "the test to be applied is whether the jury might reasonably find the evidence excluded every reasonable hypothesis except that of guilt." (*Riggs* v. *United States*, 280 F. 2d, l. c. 955)

> "The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in cir-

cumstantial evidence cases, '* * * this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering has applied it.' Panci v. United States, 1958, 256 F. 2d 308, 312.[7]

The Government insists that the legal principle announced in the cases just cited has been rejected by the Supreme Court in the case of Holland v. United States, 1954, 348 U. S. 121, 139-140, 75 S. Ct. 127, 99 L. Ed. 150. However, this Court has ruled to the contrary in a case decided since the present case was argued and submitted. Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F. 2d 220. It was there pointed out that nothing said in the Holland case, or in the authorities cited in that case, is at all inconsistent with the test to be applied in circumstantial evidence cases on motion for judgment of acquittal and on review of the denial of such motion as to whether the inferences reasonably to be drawn from the evidence were not only consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence.

It seems to us that the Supreme Court itself is not in accord with the 'Second Circuit doctrine' but is in accord with that prevailing in this Circuit and in other circuits."

The Government likewise glosses over the fact the evidence in this case does not show Petitioner ever received personally or had the personal benefit of a single dollar of the missing funds while there were six employees of the magistrate court handling its money during the period. The Courts below erred in adopting the shifting burden of proof rule used in "net worth cases." The prosecution satisfied itself with proving that Petitioner at one time had this money in his possession lawfully in

his official capacity as judge of the Magistrate Court, that the funds did not get into the County Treasurer's hands and that made a prima facie case shifting the burden of evidence to Petitioner. The Courts below adopted that erroneous theory.

The Government also ignores the fact its representatives were given 16 specific leads which it did not follow up and report on (A Vol. I, p. 222).

The Government not only did not trace a single dollar into Petitioner's personal use but made no attempt to show an increase of Petitioner's assets over the period such as is required in a "net worth case."

In a "net worth case" the Government is required to establish with reasonable certainty the taxpayer's net worth at the beginning of the period and that the taxpayer's increase in net assets for the year, plus his non-deductible expenditures, are greater than the income shown on his return. Furthermore when the taxpayer supplies the Government leads (A Vol. I, p. 222) the failure of the Government to investigate allows the Court to treat the leads as valid. *Holland* v. *United States*, 348 U. S. 121.

Here the Government did not attempt to prove Petitioner's net worth at the beginning of the period or prove any increase in net assets for the year and did not follow his leads. It wholly failed to show one single dollar of the missing money personally benefited Petitioner. This constituted a total failure of proof that Petitioner retained any taxable income during the year which was not reported. As there was here no proven deficiency in Petitioner's income taxes, it seems there can be no fraud and the charge here was unproven.

As to the serious issue of whether the Government carried its burden to produce evidence to justify a jury in finding beyond a reasonable doubt that at the time Petitioner signed the income tax return in the Mayo Hospital he had the necessary cognition, volition and capacity to make him criminally liable for signing the tax return, prepared by another and not even read by him, the Government claims "the proof on this issue consisted solely of direct evidence." (Govt. Br. p. 6).

We challenge that statement. Dr. Perry was the only witness for the Government on this issue. He had no recollection of seeing Petitioner on the morning he signed his income tax return. He checked the hospital records and found he was not marked absent on that day and so assumed he must have been on duty that day (A. 407). Assuming he was on duty that day he must have seen Petitioner while making his daily rounds (A. 407). As there was no notation in the hospital records for that day as to Petitioner's condition he assumed Petitioner must have been improved or his condition must have been improved (A. 406, 407).

We submit that is not only not "direct evidence" but no evidence at all but an unlawful pyramiding of inference on inference in violation of the rules of evidence.

In the case of *Steele* v. *Woods*, Mo. Sup., 327 S. W. 2d 187, the Court said (l. c. 197):

> "[15, 16] Of course testimony which in and of itself exposes the lack of knowledge on the part of the witness or shows that it is founded on mere guess must fall of its own weight."[18]

For all the reasons set forth in the Petition for Certiorari herein, the supporting suggestions and exhibits and this reply brief, we respectfully ask that the Writ of

Certiorari prayed for herein be issued and upon a hearing this conviction be reversed.

Respectfully submitted,

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